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No. 86-309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Bailus Walker, Jr., Maurice S. Reizen, M.D., Herman A. Ziel, M.D., Richard Reihmer,

Petitioners,

v.

Huron Valley Hospital, Inc.

Respondent.

BRIEF OF HURON VALLEY HOSPITAL, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Did the court of appeals properly refuse to review the district court's order denying petitioners' motion to dismiss on the basis of the state action antitrust exemption when that denial does not satisfy the requirements of the collateral order doctrine?

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Huron Valley Hospital, Inc. ("Huron Valley" or Plaintiff-Respondent)[1] is a Michigan nonprofit corporation that was organized in late 1975 for purposes of constructing, owning and operating a hospital in Commerce Township, Oakland County, Michigan. This litigation was initiated to redress injuries sustained

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[1] Huron Valley Hospital, Inc. is a Michigan nonprofit corporation which is a wholly owned subsidiary of Health Systems Community Hospitals, Inc., a nonprofit corporation organized on a membership basis which, in turn, is a wholly owed subsidiary of Detroit Medical Center, Inc.

by Huron Valley by virtue of the unlawful and malicious conduct of the defendants, including petitioners, in their individual and collective efforts to block Huron Valley's entrance into the health care delivery market.[2]

The courts of the State of Michigan have found that Huron Valley was improperly prevented from entering the health care delivery market, as will be hereafter discussed. They found that Huron Valley's application for a certificate of need was improperly denied by the Michigan Department of Public Health ("MDPH"). In so holding, the state courts expressly

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[2] The defendants in the lower court action include: (a) four former officials of the Michigan Department of Public Health ("MDPH"), who are petitioners here, Bailus Walker, Jr. ("Walker"), Maurice S. Reizen, M.D. ("Reizen"), Herman A. Ziel, M.D. ("Ziel") and Richard Reihmer ("Reihmer") (collectively referred to as the "state defendants"); (b) four hospitals (collectively referred to herein as the "hospital defendants") --Pontiac General Hospital (represented in the action as City of Pontiac and Pontiac Hospital Building Authority, collectively referred to herein as "Pontiac General"); Pontiac Osteopathic Hospital; Crittenton Hospital and St. Joseph Mercy Hospital; (c) the Comprehensive Health Planning Council of Southeastern Michigan ("CHPC-SEM"), the health systems agency for Southeastern Michigan that was created pursuant to the National Health Planning and Resources Development Act of 1974; (d) Paul Masseron, a member of the CHPC-SEM Executive Committee, the Chairman of CHPC-SEM's Plan Implementation Committee, and a member of Pontiac General's citizen's advisory committee, and Terrence E. Carroll, Executive Director of CHPC-SEM; and (e) the North Oakland County Planning Steering Committee, a voluntary association including each of the hospital defendants, and sponsored by the Greater Detroit Area Health Council. Amended Complaint, paras. 8-21. MDPH was originally a defendant, but it was dismissed with prejudice in connection with a settlement agreement with Huron Valley on February 18, 1983.

found that MDPH denied Huron Valley due process in considering its application.

More recently, the federal district court found that the federal government improperly denied Huron Valley's application for capital expenditure approval pursuant to Section 1122 of the Social Security Act Amendments of 1972, 42 U.S.C. §1320.

Defendants moved to dismiss this action or, "in the alternative," for summary judgment.[3] In their motion, the defendants-petitioners (or "state defendants") argued that the Amended Complaint should be dismissed (or summary judgment entered) because: (1) Counts I and II are time-barred by the applicable statute of limitations; (2) Counts I and II are barred under the doctrine of *res judicata*; (3) Counts I and II are barred by the Eleventh Amendment; (4) under Count I, the state defendants are exempt from the antitrust laws; (5) under Count II, the state defendants have immunity under section 1983; (6) under Count II, Huron Valley has failed to state a claim upon which relief may be granted; and (7) under both Counts, service of process was not validly effected as to defendants Reizen and Ziel.

The district court rejected all of these grounds for dismissal and denied the motion of the state

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[3] The state defendants styled their motion as one "in the alternative" for summary judgment. They did not, however, seek to establish by affidavits or otherwise that there are no genuine issues of fact raised by Huron Valley's allegations – except with respect to the issue of service on Reizen and Ziel. As to all other issues, a summary judgment motion was premature and improperly framed. See *Hospital Building Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746-47 (1976); *Tarleton v. Meharry Medical College*, 717 F.2d 1523, 1533-34 (6th Cir. 1983).

defendants. *Huron Valley Hospital, Inc.* v. *City of Pontiac*, 612 F. Supp. 654 (E.D. Mich. 1985). The state defendants appealed the district court's determinations that the state defendants do not have qualified immunity for purposes of section 1983 nor do they qualify for exemption from the antitrust laws under the state action doctrine.[4] The state defendants brought their appeal pursuant to *Mitchell v. Forsyth*, 472 U.S. ___, 105 S. Ct. 2806 (1985). The Sixth Circuit upheld the district court's determination that the state defendants do not have qualified immunity under section 1983 and refused to hear the attempted appeal of the state action question.

The state defendants are now seeking a writ of certiorari on the sole question of their exemption under the state action doctrine. No writ is sought on the issue of qualified immunity under section 1983. Regardless of their success in this Court, therefore, the state defendants must continue to litigate on the Civil Rights claims.

Huron Valley[5] respectfully opposes the petition for certiorari in this matter.

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[4] The state defendants also raised the Eleventh Amendment claim to the Sixth Circuit.

[5] The state defendants have improperly denoted as a respondent Martin L. Trepel, D.O. Pursuant to Sup. Ct. R. 19.6, "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court . . . ." As can be seen from the captions of the decisions of the court of appeals and the district court, Martin L. Trepel, D.O., was not a party to those proceedings. *See* Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit [hereinafter Petitioners' App.] at 1a, 15a. The district court's decision on the state defendants' motion was

STATEMENT OF FACTS

A. Huron Valley's Efforts To Obtain A Certificate of Need And Capital Expenditure Approval

On October 5, 1976, Huron Valley filed an application for a state certificate of need under Act 256 of the Public Acts of 1972, Mich. Comp. Laws Ann. §331.451.[6] Petitioners' App. at 35a *et seq.* With this application, it also filed for federal capital expenditure approval under Section 1122 of the Social Security amendments of 1972, 42 U.S.C. §1320a-1 ("capital expenditure approval") with MDPH[7] and the federally designated regional health systems agency, CHPC-SEM. Both applications sought permission to proceed with the construction of a 153-bed acute care hospital in Commerce Township, Oakland County, Michigan. This joint application, after amendment, was accepted as complete for purposes of project review in February 1977.

On March 14, 1977, CHPC-SEM recommended to MDPH that Huron Valley's application be denied.

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issued June 17, 1985. The district court granted the motion of defendants other than the state defendants-petitioners to add Martin Trepel as plaintiff on January 16, 1986. This order was entered after the notice of appeal in the Sixth Circuit was filed (August 23, 1985) and only 7 days before briefing on the appeal was complete (January 23, 1986). Trepel, therefore, is clearly not a proper party to this proceeding.

[6] Repealed and replaced, effective September 30, 1978 by Part 221 of Act 368 of the Public Acts of 1978, Mich. Comp. Laws Ann. §333.22101 *et seq.*

[7] The MDPH has been designated by the Governor to act as the State's Designated Planning Agency to administer the federal section 1122 program under the contract between the State of Michigan and the Department of Health and Human Services.

On July 5, 1977, MDPH notified Huron Valley that its application had been denied and, further, that the Director of MDPH proposed to recommend to the U.S. Department of Health and Human Services ("DHHS") that the contemplated capital expenditure be excluded from reimbursement under Section 1122. Huron Valley requested a contested case hearing before the Michigan State Health Facilities Commission ("the Commission") shortly thereafter, seeking the reversal of the MDPH decision.

Meanwhile, on June 27, 1977, Pontiac General filed a notice of intent to request a certificate of need to build a new hospital. The Pontiac General application was completed on December 8, 1977, and on January 12, 1978, CHPC-SEM recommended its approval. MDPH approved Pontiac General's application on August 25, 1978.

On review of the denial of Huron Valley's application, the Commission found numerous irregularities in connection with MDPH's consideration of the application of Huron Valley and Pontiac General—irregularities that unfairly weighted the decisions in favor of Pontiac General. The Commission nonetheless affirmed the MDPH decision on January 24, 1980.

The Oakland County Circuit Court reversed the Commission on March 27, 1981, and ordered MDPH to issue a certificate of need to Huron Valley. *Huron Valley Hospital, Inc. v. Michigan State Health Facilities Commission*, Civil Action No. 80-200439-AA (Oakland County Civ. Ct. Mar. 27, 1981).

The decision of the circuit court was affirmed by the Michigan Court of Appeals on October 7, 1981. *Huron Valley Hospital, Inc. v. Michigan State Health*

Facilities Commission, 110 Mich. App. 236, 312 N.W.2d 422 (1981); *lv. den.*, 413 Mich. 853 (1982). The court of appeals affirmed all the trial court's rulings, finding that: (a) MDPH had based its decision upon unpublished criteria that favored Pontiac General's application, which was "in violation of the statutory procedural limitations in applying their discretion," 312 N.W.2d at 425; (b) Huron Valley was deprived of an impartial review of its application in violation of its rights to due process, 312 N.W.2d at 425-27; and (c) because the MDPH decisions were "unsupported by competent, material, and substantial evidence," the circuit court was correct in directing MDPH to issue the certificate of need to Huron Valley immediately rather than remanding the matter to the Commission for further proceedings, 312 N.W.2d at 427-28.

Following the denial by the Michigan Supreme Court of the Commission's application for leave to appeal, MDPH issued a certificate of need to Huron Valley in April 1982, but limited its authorized capital expenditure to $14,789,000, the amount originally requested in Huron Valley's 1976 application, more than *five years* before the issuance of the certificate of need.

Huron Valley protested this action, claiming that the MDPH had the obligation to allow for cost increases attributable to delays in the project resulting from the action of MDPH, especially when the state courts had specifically found that MDPH had violated Huron Valley's constitutional rights. MDPH agreed with Huron Valley's position but stated that it would not voluntarily grant a capital expenditure increase

for the project unless Huron Valley agreed to certain "conditions" as part of the approval.[8]

Based upon its belief that the demands made by MDPH were both unreasonable and unlawful, Huron Valley filed a petition with the Oakland County Circuit Court in early October 1982, seeking a clarification of its prior opinion and an order directing MDPH to issue a certificate of need with a sufficient capital authorization to allow Huron Valley to proceed with construction under the circumstances existing after nearly six years of delay.

On October 21, 1982, the Oakland County Circuit Court sustained Huron Valley's position and ordered MDPH to issue a certificate of need in an amount which MDPH found to be reasonable and necessary to allow construction of the 153-bed hospital to proceed. *Huron Valley Hospital, Inc. v. Michigan State Health Facilities Commission*, Civil Action No. 80-200439-AA (Oakland County Civ. Ct. Oct. 21, 1982) (order clarifying opinion and order of March 27, 1981). Following further analysis by MDPH staff, MDPH

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[8] MDPH demanded that: (1) Huron Valley withdraw a pending application for a 150-bed addition to its facility; (2) Huron Valley agree not to file any applications for approval to construct additional beds for a period of five years; (3) Huron Valley dismiss pending antitrust litigation as to the State of Michigan and all of its departments and agencies; and (4) Huron Valley execute and deliver a general release in a form satisfactory to the Attorney General of the State of Michigan, releasing and discharging the State and all of its officers, elected officials and employees of and from any and all liability under 42 U.S.C. §1983 and/or § 1985, arising out of their activities in the review and processing of Huron Valley's application for a certificate of need and/or for capital expenditure approval under Section 1122.

finally issued a certificate of need to Huron Valley on October 27, 1982 in the amount of $44,651,000.

Huron Valley's attention then turned to obtaining capital expenditure approval. As had been the case since the issuance of the state court's opinion in the certificate of need litigation, MDPH, now sitting as the Designated Planning Agency, acknowledged that Huron Valley was entitled to a recommendation of approval, but refused to issue the recommendation absent Huron Valley's agreement to bind itself to those conditions which MDPH had set forth as a condition precedent to an increase in Huron Valley's authorized capital expenditure respecting its certificate of need.

Huron Valley continued to maintain that those conditions were unlawful. Following a series of discussions, MDPH advised Huron Valley of its decision to recommend approval of the project but again stated that it wanted all claims for equitable relief against the State dropped from the pending antitrust litigation initiated by Huron Valley.[9]

A settlement agreement was thereafter drafted and submitted to the Regional Administrator for Region V of DHHS in connection with MDPH's recommendation of project approval. On February 24, 1983, the Regional Administrator issued Section 1122 approval on behalf of DHHS. Other hospitals that are defendants in the district court then filed requests for reconsideration of this approval with Dr. Robert Graham, an Assistant Surgeon General in Washington,

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[9] Count III of said complaint sought only declaratory relief against MDPH and DHHS. MDPH was dismissed under this count.

D.C. On September 13, 1983, Dr. Graham reversed and vacated the original section 1122 approval.

After an unsuccessful attempt to persuade DHHS to reconsider this decision, Huron Valley included as Count III to the Amended Complaint a mandamus action against DHHS. Huron Valley filed a partial summary judgment motion with the district court on January 4, 1984, seeking a *writ of mandamus* directing the Secretary of DHHS to reinstate the Section 1122 approval. That motion was granted on April 16, 1984. *Huron Valley Hospital, Inc. v. City of Pontiac*, 585 F. Supp. 1159 (E.D. Mich. 1984)

B. Procedural History Of This Action

This action, alleging a conspiracy to violate the antitrust laws, commenced on November 10, 1978.[10] On January 5, 1979, Huron Valley sought leave to amend its complaint to add allegations pursuant to 42 U.S.C. § 1983 that defendants had conspired to violate its civil rights. The amended complaint also sought to add certain state officials as defendants to the action. The district court denied Huron Valley leave to amend on January 25, 1979.

On March 27, 1979, the district court granted defendants' motion for summary judgment. *Huron Valley Hospital, Inc. v. City of Pontiac*, 466 F. Supp. 1301 (E.D. Mich. 1979), *vacated*, 666 F.2d 1029 (6th Cir. 1981).

On December 11, 1981 -- two months after the Michigan State Court of Appeals affirmed the order directing the issuance of a certificate of need and ten

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[10] The assertion of the state defendants that the original complaint was filed in 1983 is incorrect. Petitioners' Brief at 2 n.1.

and one-half months before the certificate was finally issued -- the Sixth Circuit vacated the district court's decision. *Huron Valley Hospital, Inc. v. City of Pontiac*, 666 F.2d 1029 (6th Cir. 1981). The Sixth Circuit held "that the District Court erred on the standing issue and in its conclusion that the federal regulatory scheme enacts a blanket exemption from liability under the antitrust law." 666 F.2d at 1032. The appellate court, however, concluded that the district court had been "basically correct" on the issues of ripeness, primary jurisdiction and exhaustion of administrative remedies. *Id.* Therefore, it remanded the case for the entry of a stay pending the completion of the state administrative and judicial proceedings.

The stay was lifted pursuant to a pretrial conference on November 8, 1983 and an order of the district court dated December 16, 1983. In that same order, the district court granted Huron Valley leave to file an amended complaint, which Huron Valley filed on November 15, 1983. At that time, the state defendants were added as defendants.

The theory of the amended complaint is that Huron Valley's difficulties were the result of a continuing conspiracy among the defendants. The conspiracy's purpose was to prevent Huron Valley from entering the medical care market in the western Oakland County area and to frustrate at every turn Huron Valley's efforts to build a hospital and provide medical care to patients in the western Oakland County area. Amended Complaint, paras. 39 and 43. The conspirators' ultimate aim was to use their collective power to deprive Huron Valley of funding and to manipulate the state health bureaucracy in a manner to reserve all medical surgical acute care hospital services in the

area to the hospital defendants and their co-conspirators. Amended Complaint, paras. 39(b), 39(c) and 43.

Count I of the amended complaint is a claim under Section 1 of the Sherman Act alleging that, beginning in April 1976, the defendants engaged in a conspiracy in restraint of trade to reduce and eliminate competition by preventing Huron Valley from entering the medical-surgical acute care market. The amended complaint alleges, among other things, that the defendants conspired to prevent Huron Valley from obtaining a certificate of need from MDPH.

Count II is a claim under 42 U.S.C. § 1983 against the state officials, officials of CHPC-SEM and the hospital defendants. It alleges a conspiracy to deny Huron Valley's Fourteenth Amendment due process rights.

In March 1984, the state defendants and the hospital defendants moved to dismiss the amended complaint or for summary judgment. On June 15, 1985, the district court denied all the motions, 612 F. Supp. 654 (E.D. Mich. 1985), and the state defendants filed their appeal to the Sixth Circuit. The Sixth Circuit affirmed the district court's denial of the state defendants' claim to qualified immunity under 42 U.S.C. § 1983 and refused to hear an appeal of the state action question. The Sixth Circuit found that the district court's denial of the state action question did not meet any of the requirements of the collateral order rule. Petitioners' App. at 7a-9a.

ARGUMENT

I. THE STATE DEFENDANTS' ATTEMPT TO OBTAIN REVIEW OF THE DISTRICT COURT'S DENIAL OF THEIR MOTION IS PREMATURE AND DOES NOT SATISFY THE PREREQUISITES OF THE COLLATERAL ORDER DOCTRINE

Under 28 U.S.C. § 1291, the Courts of Appeals have the power to review only "final decisions." This Court has "consistently interpreted this language as indicating that a party may not take an appeal under this section until there has been 'a decision by the District Court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." ' " *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-74 (1981), *quoting Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), *quoting Catlin v. United States*, 324 U.S. 229, 233 (1945). The final judgment rule prevents "piecemeal appeals" which might undermine a district judge's independence and cause additional cost and trouble. *Firestone Tire & Rubber*, 449 U.S. at 374. Therefore, as long as a matter remains "open, unfinished or inconclusive," there may be no appeal. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

As the state defendants realize, Petitioners' Brief at 6, since there is no final judgment in this case, the only possible theory which supports their claim of jurisdiction in the appellate court for appeal of a denial of a motion to dismiss is the collateral order doctrine. In *Cohen*, 337 U.S. at 546, this Court acknowledged the existence of an exception to the final judgment rule -- a

> small class [of orders] which finally determine claims of right separable from, and collateral to,

> rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

In its latest cases dealing with the *Cohen* doctrine, this Court has formulated the test as comprised of, at minimum, three conditions:

> It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'

Richardson-Merrell, Inc. v. Koller, 105 S. Ct. 2757, 2761 (1985), *quoting Coopers & Lybrand*, 437 U.S. at 468. See also *Mitchell v. Forsyth*, 472 U.S. ___, 105 S. Ct. 2806, 2816-17 (1985). This Court has also emphasized that the collateral order doctrine is a narrow exception to the final judgment rule. *Richardson-Merrell*, 105 S. Ct. at 2761; *Firestone Tire & Rubber Co.* 449 U.S. at 374.

The order denying motion to dismiss or for summary judgment on the state defendants' claim of a state action exemption from the antitrust laws does not meet any of the elements of the collateral order doctrine. The district court's order denying the state defendants' claim of exemption under the state action doctrine does not meet the first requirement—to conclusively determine the questions presented. In *Cohen*, the Court was concerned with whether the order in question was "subject to reconsideration from time to time." 337 U.S. at 547. In *Coopers & Lybrand*, 437 U.S. at 469, the Court found a class decertifi-

cation order not appealable because, *inter alia*, it was subject to revision under Fed. R. Civ. P. 23(c)(1) and, thus, was "inherently tentative." The reasoning of *Coopers & Lybrand* reaches pretrial orders "as to which some revision might reasonably be expected in the ordinary course of litigation." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 12 n.14 (1983). The state defendants remain free to renew their motion for summary judgment. The motion upon which the district court ruled was filed prior to any discovery. All of the other defendants have, in fact, subsequently filed another round of summary judgment motions which incorporate the results of the discovery process. So, too, the state defendants at their own option could renew their motion.

The state defendants misinterpret this element in their Petition to this Court. They state that

> Like the claims of double jeopardy, the speech and debate clause, absolute immunity, and qualified immunity, the state-action antitrust immunity doctrine is a complete, formal, and final rejection of Plaintiff's Sherman antitrust claim.

Petitioners' Brief at 8 (footnotes omitted). The focus of the *Cohen* analysis is not on what would happen to plaintiff's claim if the motion were to have been granted but upon what happens to the state defendants' claim since the motion was not granted. Were the analysis as the state defendants would have it, the denial of any motion to dismiss or for summary judgment would meet this element—obviously if such motions were granted, the plaintiff's claims would be rejected.

The second element of the collateral order doctrine is that the order must "resolve an important issue completely separate from the merits of the action." The *Cohen* court described this element as satisfied when the order is "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. In *Coopers & Lybrand*, the Court found that an order denying class certification involved "considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " 437 U.S. at 469, quoting *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963). Similarly, in this case, a resolution of the application of the state action doctrine to officials of a state administrative agency involves analysis which overlaps with analysis of whether Huron Valley's rights have been violated. For example, in order to determine whether there are clearly articulated or affirmatively expressed state policies which permit the challenged restraint, the facts concerning the alleged anticompetitive conduct must be examined. As the court of appeals pointed out, this analysis is different from the qualified immunity analysis under the Civil Rights laws where the only question is whether the law was clearly established at a given time. Petitioners' App. at 8a. The state defendants' equation of the state action analysis to the qualified or absolute immunity analysis is incorrect.

This Court must also consider whether orders denying dismissal or summary judgment on state action claims as a class are sufficiently separable from the merits to allow appeal. Since such orders generally involve an examination of the facts of the case, it

would be inappropriate to allow immediate appeal. As this Court has pointed out, it "has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal." *Richardson-Merrell*, 105 S. Ct. at 2765. Since most orders denying dismissal or summary judgment involve such factual analysis, collateral review of this class of orders should not be permitted.

The final element of the *Cohen* doctrine is that the order must "be effectively unreviewable on appeal from a final judgment." Denial of immediate review must " 'render impossible any review whatsoever.' " *Firestone Tire & Rubber Co.*, 449 U.S. at 376, quoting *United States v. Ryan*, 402 U.S. 530, 533 (1971). The distinction drawn in the collateral order cases is between losing a right forever if review is postponed and mere prejudicial effects from delaying appellate review. In the latter cases, even though postponing review adversely affects the litigant, immediate appeal is not available. Thus, this Court has not allowed immediate review of orders refusing to disqualify counsel in civil cases, *Firestone Tire & Rubber Co.*, 449 U.S. at 379, orders disqualifying counsel in criminal, *Flanagan v. United States*, 465 U.S. 259 (1984), or civil cases, *Richardson-Merrell*, 105 S. Ct. 2757, and orders denying motions to dismiss on speedy trial grounds, *United States* v. *MacDonald*, 435 U.S. 850 (1978). All these classes of orders were found to be effectively reviewable after trial. In contrast, the Court has allowed review of orders involving grant of a stay of arbitration, *Moses H. Cone Memorial Hospital*, 460 U.S. at 12, double jeopardy, *Abney v. United States*, 431 U.S. 651 (1977), absolute immu-

nity, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and qualified immunity, *Mitchell*, 105 S. Ct. 2806.

State defendants contend that the state action doctrine is an immunity doctrine comparable to absolute or qualified immunity, that is, that it is an entitlement not to stand trial or face other burdens of litigation. Therefore, they argue, their right not to face the burdens of litigation will be lost forever if immediate appeal is not granted.

As an initial matter, it should be noted that, regardless of the outcome of this petition, the state defendants must return to district court to litigate the Civil Rights Act claims. The district court and court of appeals rejected their argument of entitlement to qualified immunity and Huron Valley's claims under 42 U.S.C. §1983, which rest on facts substantially similar to those supporting the Sherman Act claim, remain.

This Court has never characterized the state action doctrine as an immunity from suit. And the state defendants have misquoted *Hoover v. Ronwin*, 466 U.S. 558, 581, n.34 (1984), in their attempt to characterize the state action doctrine as an immunity from suit. In *Hoover*, the Court held that the grading of bar examinations by a Committee appointed by the Arizona Supreme Court was not subject to antitrust challenge. Following a detailed analysis of the Arizona scheme for establishing and grading bar examinations, the Court concluded that the role of the Arizona Supreme Court was so pervasive that the challenged conduct was "in reality that of the Arizona Supreme Court." 466 U.S. at 573. The Court had previously held that "a state supreme court, when acting in a legislative capacity, occupies the same position as that

of a state legislature" and its decisions are exempt from antitrust liability as sovereign state action. 466 U.S. at 568, *citing Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The actions of the Arizona Supreme Court and its Committee in grading the bar examinations were, therefore, exempt from Sherman Act liability.

The Court emphasized that when the actions in question are those of the sovereign, not those of private parties or subordinate state agencies, 466 U.S. at 568, "the action is exempt from antitrust liability regardless of the State's motives in taking the action." 466 U.S. at 580. It was in that context that the Court pointed out that Ronwin's suit basically challenged the motive of the Arizona Committee—that its purpose in devising the grading formula was to limit competition. 466 U.S. at 581 n.34. Following its comments upon facing the burdens of litigation to refute a charge of improper motive, the Court went on to say

> In our view, as the action challenged by Ronwin was that of the State, the motive of the Committee in its recommendations to the Court was immaterial . . . . Our attention has not been drawn to any trade or other profession in which the licensing of its members is determined directly by the sovereign itself—here the State Supreme Court.

Id. An entirely different analysis and emphasis is required where the actions are not those of the sovereign itself, as is true in this case.[11]

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[11] State defendants appear to argue at one point that their conduct is "that of the State." Petitioners' Brief at 7. As em-

> [I]n cases involving the anticompetitive conduct of a nonsovereign state representative the Court has required a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation. . . . The Court also has found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry . . . . Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear articulation' and 'active supervision.'

466 U.S. at 569.

With nonsovereign state representatives, the inquiry is extended and involves both issues of 'clear articulation' and 'active supervision. *See also New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721, 1731 (1985), the Court found that the two-pronged test of *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97 (1980), is not limited to suits against state agencies, as was Midcal, but is also applicable to suits against private parties. 105 S. Ct. at 1731. "The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant." *Id.*

The necessary state action analysis distinguishes the resolution of the state action exemption from the resolution of absolute or qualified immunity. Further,

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ployees of a subordinate state agency, there would appear to be no question that their conduct is not directly "of the Sovereign" for purposes of the state action doctrine.

there is no entitlement to freedom from the burdens of litigation which has been established in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. Without such an entitlement, there is no right which is lost without an immediate appeal. Should the state defendants eventually win an appeal after a loss at trial, their right to be free from liability under the Sherman Act would be vindicated.

In sum, there is no basis upon which this Court can conclude that the order denying the state action exemption to the state defendants is an appealable order. None of the requirements of the collateral order doctrine have been met.

II. THE STATE DEFENDANTS' PETITION FAILS TO STATE A REASON FOR GRANTING CERTIORARI

Rule 17 of this Court provides:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision . . . .

> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The state defendants have shown no conflicts among the circuits, no conflict with decisions of this Court, no important question of federal law that this Court has not previously decided, and certainly no unusual departure from the normal course of judicial proceedings.

To the contrary, the petition seeks to interrupt and disrupt the normal course of judicial proceedings to seek interlocutory and piecemeal review of questions that can be fully and completely reviewed after the entry of final judgment.

CONCLUSION

Since an order denying a motion to dismiss or for summary judgment on a state action claim does not satisfy the requirements of the collateral order doctrine, the refusal of the Sixth Circuit to take jurisdiction of the state defendants' appeal was proper. No basis for review by this Court exists and no writ

of certiorari should issue.

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Respectfully submitted,

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